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PARLIAMENTARY COMMITTEES: THE PROTECTION
OF WITNESSES, THE ROLE OF COUNSEL AND
THE RULES OF EVIDENCE

Katharine Dunkley
Bruce Carson

Law and Government Division
Research Branch
Ottawa

3 February 1986



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PARLIAMENTARY COMMITTEES: THE PROTECTION OF WITNESSES,
THE ROLE OF COUNSEL AND THE RULES OF EVIDENCE

INTRODUCTION

Committees of the Canadian House of Commons are increasingly active and make frequent use of public hearings during which Members hear and question witnesses. Individual citizens, interest groups, corporate executives, academic experts, union leaders, speakers for aboriginal peoples, farmers and trappers all appear to give their views and respond to questions, as do public servants and Ministers. Wide-ranging hearings may be held when committees deal with legislation or estimates, as well as when inquiries are undertaken - either by special committees, or under the new permanent order of reference of reports to Standing Committees.

With the adoption of most of the recommendations of the Special Committee on Reform of the House of Commons, a further restructuring and expansion of the roles of committees will take place.⁽¹⁾

Despite the widespread and growing use of public hearings, some of the rules under which committees operate are not well known or understood. While in most other spheres, procedural safeguards abound and the rules of natural justice are adhered to, or litigated at great length, parliamentary committees continue to function in a flexible manner, varying their practices to suit the particular proceedings and the wishes of committee members. This flexibility is advantageous. A committee's role can range from public consultation - travelling across the country to invite a wide range of views from the public or certain groups in order to publicize policy proposals or gather information for future government action, to investigations of specific incidents (allegations of breach of

(1) Canada, Special Committee on Reform of the House of Commons, Report, June 1985, p. 15.

privilege, mishandling of public funds) during which members are called on to assess and weigh evidence in much the same manner as quasi-judicial decision-makers.

In carrying out these varied tasks, committees operate within the "law and custom of Parliament," some elements of which are expressed in legislation, the Standing Orders of the House and procedural decisions made in the past. Generally speaking, the powers of committees are broad; the constraints on them are few and protection afforded to those testifying (or those whose names are mentioned in testimony) very limited. In most cases, this provides for a free flow of information, an enlightening and educational exchange between legislators and members of the public. On occasion, unfounded or unfair allegations may be made and widely publicized or damaging information may be exposed, with no recourse available to those whose reputations suffer. In all cases, parliamentary committee inquiries fulfil a "political" function. Whether or not it involves partisan politics, a committee's uniqueness and value arise from the difference in the approach of parliamentarians - they are not judges, royal commissioners or academic researchers, but rather legislators gathering and testing public opinion. The problem that may arise is how to preserve the flexible nature of these political inquiries and yet afford some rights and protection to witnesses, particularly in the case where lack of control of evidence could result in damage to an individual's reputation, release of confidential information or interference with judicial proceedings on related matters.

This paper studies issues relating to the protection of witnesses, the rules of evidence and the role of counsel during parliamentary committee hearings. The first section sets out the general rules governing these matters in committees of the House of Commons, drawing as well on the Rules of Parliament of the United Kingdom. The second section surveys reform proposals and existing rules in other jurisdictions where similar problems have arisen. Detailed reference is made to recent studies in Ontario and Quebec. The final section offers an assessment of these approaches and suggestions for House of Commons committees in future, taking into account both their varied activities and their fundamental nature as political bodies of inquiry.

WITNESSES AND EVIDENCE BEFORE COMMITTEES OF THE HOUSE OF COMMONS

A. Guidelines: The Law and Customs of Parliament

1. The Source of Committee Authority

The right to institute inquiries is an integral part of the "privileges, immunities and powers" of Parliament referred to in section 18 of the Constitution Act and confirmed in statutory form in section 4 of the Senate and House of Commons Act.⁽¹⁾ The procedural rules are developed by Parliament itself; some are set out in Standing, Sessional and Special Orders of the House - others have arisen through precedent and tradition, the interpretation and application of the rules over the years in Parliament.

Inquiries are a necessary part of the legislative, financial and representational functions of a democratic parliament. In order to fulfil its constitutional role, Parliament must be able to gather a wide range of information, relating to all matters within its jurisdiction. Inquiries should relate to subject matters within federal legislative competence.⁽²⁾

A committee is the primary method of carrying out parliamentary inquiries. A committee may be looked upon as an arm of either the Senate or the House of Commons (or the two together, in the case of a joint committee). It derives its existence and authority from its authorizing

(1) The text of s.18 of the Constitution Act, relevant sections of the Senate and House of Commons Act and selected applicable Standing Orders are reproduced for reference in Appendix I.

(2) The limitation imposed by the federal division of powers is not rigid and probably unenforceable. Note first that Parliament has power to make laws for the "peace, order and good government" of Canada, as well as to achieve more specific goals. Further, in terms of parliamentary inquiries (as opposed to legislation), the limits are set by and enforced by Parliament itself. Committee reports may call for federal-provincial cooperation or even urge provincial action.

legislature. A former Clerk of the British House of Commons, Sir Richard Barlas, cites three general principles which are relevant to committees of both the Canadian House of Commons and the United Kingdom:⁽¹⁾

- 1) The House cannot delegate more power than it possesses itself.
- 2) Under the law of parliament, penal powers, particularly the power to punish for contempt are possessed by the House itself and cannot be delegated to a committee. (Thus although a committee may report misconduct of witnesses to the House, it cannot enforce its own rules by contempt proceedings.)
- 3) A committee may only exercise its authority within the areas which the House has defined; that is, it must work within the terms of reference which the House has given it.⁽²⁾

2. Powers of Committees

Thus a committee has the power to inquire into any matter referred to it by the House - matters referred may include legislation or the subject matter of legislation, spending estimates, subjects for special inquiries, permanent orders of reference to scrutinize public accounts, regulations and statutory instruments, questions of privilege or routine matters of parliamentary administration. The subject matter of the inquiry is set forth in the order of reference, but the committee is free to interpret those terms of reference.

The Standing Orders define some aspects of the powers of standing committees, but these may be restated, amplified, varied or restricted by the House. Standing Order 70(8) enumerates the usual powers of standing committees:

Standing committees shall be severally empowered to examine and enquire into all such matters as may be referred to them by the House, and, to report from time to time, and, except when the House otherwise orders, to

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- (1) Summarized from United Kingdom, Select Committee on Procedure, 1977-78, First Report, Vol. I, Appendix C, Barlas Memorandum, "Powers of Select Committees to Send for Persons, Papers and Records (PPR)," p.16
 - (2) The impact of this limitation in day-to-day activities of a committee is governed by the fact that the committee is free to interpret its own mandate, and may choose to give a broad interpretation.

send for persons, papers and records, to sit while the House is sitting, to sit during periods when the House stands adjourned ... to report direct to the House.

Note that only the powers "to examine and inquire" (into matters referred) and "to report from time to time" are not explicitly qualified. In addition, under the new provisional rules adopted on February 13, 1986 standing committees are empowered to study and report on all matters relating to the mandate, management and operation of government departments. Therefore, these committees will be looking at program and policy objectives of departments as well as government medium and long term spending plans.

A committee generally has the power "to send for persons, papers and records." Parliament has power to summon, and compel the attendance of, persons within the jurisdiction and to order the production of documents. A committee has similar powers in relation to the matter referred to it. However, if it attempted to exercise its powers to send for persons, papers and records outside the delimited area, this action would be ultra vires.

As a matter of practice, witnesses are invited to attend; they are rarely summoned. The Standing Orders provide that no witness is to be summoned to attend before any committee of the House unless a certificate has first been filed with the Chairman by a committee member, stating that member's opinion that the evidence to be obtained from the witness is material and important. In the great majority of cases, witnesses are invited or ask to appear, and no assessment of the importance of the evidence is undertaken.

A witness appearing before a committee may be required to give evidence under oath, as provided in the Senate and House of Commons Act.⁽¹⁾ An oath may be administered in any type of committee proceeding to any witness (voluntary witnesses or those compelled to attend).

A witness before a committee must answer any and all questions put by the members, and produce documents as required by the committee. The classic statement of the duty of witnesses before parliamentary committees is found in Erskine May's treatise on parliamentary practice:

(1) Sections 27-30 deal with oaths and affirmations. The Schedule provides Forms. See Appendix I for the text of these provisions.

A witness is bound to answer all questions which the committee sees fit to put him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client, or on the ground that he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit, or that it would prejudice him as defendant in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law. Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not to disclose them without his express authority. He may, however, request that the whole or part of his evidence should not be published.(1)

The legal rules of evidence do not apply in parliamentary committee proceedings except a basic requirement that the evidence be relevant to the inquiry. .

A question put to a witness may be objected to by a member, and objections are not limited to those allowed in a court of law since the legal rules of evidence do not apply. A witness may also express to the Chairman unwillingness to answer a question. In either case the committee will consider the matter and decide in all the circumstances of the case whether the witness should be compelled to respond and whether the answer should be given in the public hearing or in camera. The impact of the requirement to answer any and all questions is reduced somewhat by the extension of the privilege of the House to witnesses - nothing said before a committee may be used in a court, unless the privilege is waived.(2)

A witness who fails to attend if summoned, or to continue attending or to answer questions cannot be punished by the committee itself. The committee may report the conduct of the witness to the full House for remedial action.

(1) Erskine May, Treatise on The Law, Privileges, Proceedings and Usage of Parliament, 20th ed., Butterworths, London, 1983, p. 746-47.

(2) Beauchesne's Rules and Forms of the House of Commons of Canada, 5th ed., Carswell, Toronto, 1978, p. 199.

3. Power of the House to Punish for Contempt

Failure to attend or refusal to answer questions can constitute a contempt of Parliament. Beauchesne describes the procedure to be followed by a committee in such cases as follows:

a) If a witness should refuse to appear, on receiving the order of the chairman, or if a witness refuses to answer questions, his conduct may be reported to the House and an order immediately made for his attendance at the Bar or before the committee. If he still refuses to obey, he may be ordered to be sent for in the custody of the Sergeant-at-Arms, or he may be declared guilty of a breach of privilege and ordered to be taken into the custody of the Sergeant-at-Arms.

b) The conduct of a witness before a committee can be considered by the House only after receiving a report thereon from the committee.(2)

The report to the House is authorized by a resolution of the committee, explaining the circumstances surrounding the refusal to comply with the committee's order, and recommending that the House itself order attendance of the witness or order him or her to answer all questions put if he or she has appeared but refused to answer some questions.

When the House is advised that a witness refuses to appear or to testify, it may itself order that the witness appear before the committee to answer all the questions put by members. It could also order that the witness appear at the Bar of the House. This procedure has not been used since 1913. If the witness still fails to obey the order of the House, he or she can be declared to be in contempt of the House and thus reprimanded or ordered committed to jail. The former provides only light punishment; the latter is a drastic method used only once in the more than 100 years of our parliamentary history.

Any disobedience to the rules or orders of the House or a committee may be considered to be a contempt of Parliament. This includes refusal to attend, answer questions, produce documents, or the giving of false evidence before a committee. Witnesses are also protected by these powers of the House - anyone interfering with a witness, endeavouring to prevent a witness from appearing or encouraging a witness to withhold evidence or give false evidence is in breach of privilege and can be punished by the House.

(2) Ibid., p. 200.

This problem of a committee's power to compel witnesses to attend was of particular concern to the Special Committee on Reform of the House of Commons. In its final report, the Committee stated that the effective operation of the committee system was dependent upon the cooperation of witnesses especially those from government departments.⁽¹⁾

4. Protection of Witnesses.

a. Parliamentary Privilege

As discussed in the preceding section, a witness before a parliamentary committee may be compelled to answer any question relevant to the committee's inquiry, even if the answer is incriminating, prejudicial to the reputation or business interests of the witness or of others, or is information received in a privileged communication. In providing such information, the witness does enjoy the protection of the House; the parliamentary privilege of freedom of speech, whose source is the Bill of Rights of 1688 extends to witnesses appearing in parliamentary proceedings. Maingot describes the protection as follows:

The Bill of Rights, 1688 is not restricted to members; therefore whatever protection is afforded the member is equally afforded to the non-member under the same circumstances. Accordingly, witness, petitioner, counsel, and others whose assistance the House considers necessary for conducting its proceedings are protected by "the rule of Parliament being that no evidence given in either House can be used against the witness in any other place without the permission of the House."⁽²⁾

It is clear from this passage that the protection is not a guarantee or a right belonging to the witness. It is a privilege or immunity extended by the House, and can be withdrawn by that body. The House of Commons has in the past granted permission to use in court evidence given by members and others in relation to civil and criminal proceedings.⁽³⁾ A witness is also open to prosecution for perjury based on

(1) Special Committee on Reform of the House of Commons, Report, June 1985, p. 21.

(2) J. Maingot, Parliamentary Privilege in Canada, Butterworths, Toronto, 1982, p. 32, citing Bourget, 4th ed. p. 74.

(3) Maingot (1982), p. 33 and p. 125.

evidence given during a proceeding in Parliament.⁽¹⁾ The giving of false evidence as well as refusing to attend or give evidence are also breaches of parliamentary privilege, punishable as a contempt of Parliament, by the procedure described above.

In the case of withdrawal of privilege, Maingot points out that even if the privilege is withdrawn, the court may or may not use the evidence, applying legal rules of evidence and the judicial, rather than the parliamentary interpretation of parliamentary privilege.⁽²⁾

b. Canadian Charter of Rights and Freedoms

A witness appears to have more secure protection against the use of evidence given before a parliamentary committee in subsequent criminal proceedings by operation of section 13 of the Charter which states:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

The phrase "in any proceedings" may be broad enough to encompass parliamentary committee hearings.⁽³⁾ The protection applies only to "incriminating evidence" used to "incriminate" that witness; that is, evidence which would subject the witness to criminal liability. There is no protection offered in relation to civil proceedings. All rights in the Charter are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

c. Committee Discretion

In all other aspects, witnesses must rely on the discretion of the committee following the usual customs and procedures of Parliament. Within its terms of reference, the committee's power is unlimited. It is up to the chairman to maintain order and decide all questions of order, and

(1) See s.31, Senate and House of Commons Act, R.S.C. 1970, c. S-8 and the Criminal Code, R.S.C. 1970, c. C-34, as amended, ss. 107, 120, 124.

(2) Maingot, p. 125.

(3) Peter Hogg, Constitutional Law of Canada, 2d. ed., Carswell, Toronto, 1985, p. 783.

give procedural rulings. There is no restriction on the scope of questioning by members other than that it should be relevant to the matter under consideration. The interpretation of both relevance and the scope of the terms of reference is also vested in the committee. A committee need not adhere to the rules of evidence used in the courts such as prohibiting the admissibility of hearsay evidence.

Members may object to questions or lines of questioning, and the chairman of the committee will rule on the matter. A similar disposition occurs if the witness expresses reservations about questions.

The role of counsel before committees is entirely within the discretion of the committee to decide. A witness has no right to have counsel attend, although committees usually permit counsel to be present to advise a witness. Counsel rarely participate actively in the proceedings. They may not object to questions on behalf of their client, or examine or cross-examine witnesses.

Staff may assist the work of the committee, and in some instances committees call for legal advice, generally as to the substance of matters under consideration and the types of evidence required. In the case of the Standing Committee on Privileges and Elections, the Law Clerk and Parliamentary Counsel has advised on matters of parliamentary privilege as well as with respect to the specific order of reference before the committee at a particular time.

If a witness is called upon to answer incriminating questions or reveal confidential information, the committee has the option of hearing evidence in camera. This is an easily available mechanism for the protection of witnesses, but most committees of the House of Commons prefer to take evidence in public whenever possible, since parliamentary committee proceedings are usually public inquiries designed to promote rather than restrict the flow of information.

EXPERIENCE IN OTHER JURISDICTIONS

A. Ontario

In recent years several significant studies on protection of witnesses before legislative committees have been undertaken in Ontario.

This section will deal with the Report on Witnesses tabled in 1980 by the Standing Procedural Affairs Committee of the Ontario Legislative Assembly,⁽¹⁾ then discuss an in-depth technical study by the Ontario Law Reform Commission entitled Report on Witnesses before Legislative Committees (1981)⁽²⁾ (undertaken in pursuance of the recommendations of the Procedural Affairs Committee Report of 1980), and conclude with the 1982 response of the Procedural Affairs Committee to the Ontario Law Reform Commission's Report.⁽³⁾ The Ontario proposals are of interest coming as they do from a Canadian province in a common law jurisdiction subject to many of the same influences as the federal Parliament. These reports complement the comments of the Quebec Task Force discussed in the following section.

1. Procedural Affairs Committee Report on Witnesses (1980)

The Procedural Affairs Committee noted that the situation of witnesses before committees was unsatisfactory and called for legislative change as well as revision of the provincial assembly's Standing Orders. The committee stated several basic principles important to witnesses before legislative committees, but left more technical matters to the Law Reform Commission, which was asked to undertake a thorough, expert and independent review of the law and submit proposals for reform. The legislative committee's basic principles are important in any consideration of the work of parliamentary committees, and thus are summarized here.⁽⁴⁾

The Committee noted that the frequency of appearances by witnesses had greatly increased. Witnesses include experts, civil servants, interest groups and individual citizens expressing their views. The rules applying to committees, particularly the protection, privileges and duties

(1) Ontario, Legislative Assembly, Standing Committee on Procedural Affairs, Report on Witnesses before Committees, 4th Session, 31st Parliament, 1980, 24 p., (hereafter referred to as Report on Witnesses).

(2) Ontario Law Reform Commission, Report on Witnesses before Legislative Committees, Ministry of the Attorney General, Toronto, 1981, (hereafter referred to as OLRC Report).

(3) Ontario, Legislative Assembly, Standing Committee on Procedural Affairs, Report on Standing Orders and Procedure (No. 1), 2nd Session, 32nd Parliament, 9 December 1982, 54 p.

(4) The following passage summarizes Report on Witnesses (1980), p. 3-24.

of witnesses, are not widely known or understood. For example, the status of witnesses seems to vary depending on their position or role. Their rights and protections seem to be different if they are experts, public servants, members of the general public, witnesses who are summoned, witnesses who appear voluntarily, witnesses who are sworn, or witnesses who are not sworn.

A further problem of control may arise:

In most public hearing situations, witnesses are not pre-screened, so that Members often have no idea what a witness will say before them. This leaves the Committee little control over the statements made before it. Usually the Chairman has neither the training nor the inclination to cut off improper remarks by witnesses, except in the most extreme circumstances.(1)

The Committee proposed three basic principles which should be considered in any discussion of the rights, duties and protection of witnesses. They are: the need for fairness, for clarity, and for an understanding that parliamentary committees are unique institutions:

- a. Fairness must prevail: fairness must be guaranteed to witnesses by ensuring that they understand the process fully, and also to persons about whom witnesses may comment.
- b. Clarity: it is essential that the rights, protections and obligations of witnesses be clearly understood by all concerned. Too much reliance on unwritten traditions leads to uncertainty and misunderstanding.
- c. Committees are unique institutions: they are political inquiries conducted for the purposes of the Members of the Assembly. Although on occasion committees inquire into allegations of wrongdoing and then have courtlike trappings, such enquiries differ in their fundamental nature from judicial enquiries and this difference must be taken into account. Although current practice is too lax, rigid rules, formalities and technicalities would hamper the work of most committees and should be avoided. An adversarial process should not be allowed to develop. Procedures relating to witnesses are in need of revision and clarification, but care must be taken that so many formalities are not imposed that proceedings are bogged down, witnesses intimidated and the exchange of information and opinion between witnesses and Members impeded.(2)

(1) Report on Witnesses (1980), p.4.

(2) Ibid., p. 6.

The report goes on to survey the privileges of witnesses, and seeks clarification of such legal and constitutional matters related to evidence given before parliamentary committees as: limits on the use of evidence in other proceedings; the balance between protecting witnesses and limiting abuse of privilege; the impact of the oath; and potential ways of protecting third parties. Although unable to reach consensus on these specific issues, the committee endorsed the principles of the 1972 report of the Australian Attorney General and Solicitor General⁽¹⁾ which emphasized the need for flexibility and a balance between protection of witnesses and effective functioning of committees, based on a wise use of discretion.⁽²⁾

The Ontario Committee recommended continuing the current practice of hearing witnesses in camera only in highly unusual circumstances, and retaining committee control of the role of counsel. That is, witnesses may have counsel, but should not be obliged to do so; any decision as to the role of counsel should be at the discretion of the committee; normally counsel should not speak or cross-examine witnesses, but in exceptional circumstances such active participation might be appropriate and should not be foreclosed.⁽³⁾ The committee emphasized their view that public servants have no special status as witnesses, except in the case of matters of Crown privilege, but asked for clarification from the Law Reform Commission on this issue.

The Committee report concluded with a statement on the role of the Chairman:

Finally, the Committee should like to emphasize, in the strongest possible terms, the weight of responsibility resting upon Committee Chairmen to protect

(1) Australia, Parliamentary Paper No. 168, Parliamentary Committees: Powers Over and Protection Afforded to Witnesses (hereinafter referred to as the Australian Report), 1972.

(2) Report on Witnesses (1980), p. 13.

(3) Ibid., p. 14-15.

witnesses and to protect persons who may be mentioned by witnesses. The Committee is not about to tell Chairmen how to run their Committees, but it does feel it essential that Chairmen are aware of the pitfalls and uncertainty surrounding committee witnesses, and are familiar with the provisions of The Legislative Assembly Act and the federal and provincial evidence acts respecting witnesses ... Chairmen must be prepared to explain to witnesses their rights and obligations, to intervene to protect witnesses from unfair questioning and to protect third parties from objectionable comments by witnesses. The good judgment of the Chairman is one of the most important protections enjoyed either by witnesses or by third parties whom witnesses mention.(1)

The Committee posed a series of questions on the subject of witnesses for the Ontario Law Reform Commission, whose conclusions were set out in a report published in 1981.

2. Ontario Law Reform Commission: Report on Witnesses Before Legislative Committees (1981)

The two major portions of the Report deal with the powers of legislative committees and the rights and protection of witnesses before them.

a. Powers of Committees

The powers of committees of the Ontario legislature are similar to those of committees of the House of Commons in that they are defined in part by statute,(2) and in part by parliamentary precedent and tradition. The Assembly may compel attendance of witnesses and production of papers and things necessary to an inquiry.(3) Attendance of a witness may be required by Speaker's warrant.(4) Disobedience to a summons or refusal to cooperate with a committee may be punished by the Assembly as a breach of privilege or contempt, punishable by imprisonment.(5)

(1) Ibid., p. 18-19.

(2) Legislative Assembly Act, R.S.O. 1980, c. 235.

(3) Legislative Assembly Act, s. 35(1).

(4) OLRC, Report, p. 15.

(5) Ibid., p. 15.

A committee may examine witnesses under oath with the result that the giving of false evidence, "with intent to mislead, knowing that evidence is false"⁽¹⁾ constitutes the crime of perjury and is also punishable as a contempt.

The Commission examined the law with respect to classification of witnesses (those with voluntary or compulsory attendance, those sworn or not sworn) and came to the conclusion that,

as a matter of law, witnesses before legislative committees do not have different rights and obligations depending solely upon the circumstances of their appearance - that is, whether they appear of their own volition, at the request of a committee, or by Speaker's warrant.⁽²⁾

Although there are clearly practical differences, no stigma should attach to a witness compelled to appear.

The Commission, firmly believes that, insofar as the circumstances of appearance are concerned, the legal rights and obligations of all witnesses who appear before legislative committees are, and should continue to be, identical.⁽³⁾

With respect to oaths and affirmations, the Commission recommended no substantial change in the current Ontario practice of infrequent use of the oath. The decision as to its use would continue in the discretion of the committee, having regard to all the circumstances, including the nature of the inquiry.⁽⁴⁾ Increased use of the oath might encourage truthfulness, but might also discourage witnesses from appearing to state their views. In the Ontario Assembly, as in Parliament, giving false evidence may constitute contempt whether or not the person has been sworn. The Commission also rejected categorizing committee proceedings as "administrative" or "investigatory"⁽⁵⁾ and applying different rules as

(1) Ibid., p. 16.

(2) Ibid., p. 15.

(3) Ibid.

(4) Ibid., p. 19.

(5) See contrasting Quebec proposals on this subject, pp. 28-31, infra.

to swearing of witnesses in the two types of proceedings. They noted that a satisfactory functional definition of the types of proceedings where an oath should be used would be very difficult to arrive at. In addition, purely routine proceedings may develop into investigations or involve questions of the rights, reputation or conduct of individuals or organizations.⁽¹⁾ The Law Reform Commission recommended continuation of the current practice, provided that "where the rights or reputation of an individual or the propriety of an individual's conduct are or may be involved" the witness should be sworn. In deciding whether or not to swear a witness a committee should not distinguish between voluntary witnesses and those compelled to attend. They also recommended a new form of affirmation,⁽²⁾ to replace the current oath and affirmation, with the crime of perjury attaching to breach of the affirmation, as at present.

On the subject of the virtually unlimited power of parliamentary committees to call witnesses to attend to answer questions and produce documents, the Law Reform Commission cited with approval the statement quoted above from Erskine May.⁽³⁾ Despite the scope of these powers, the Commission specifically rejected the proposal that a witness should have the right to refuse to answer questions on the ground of self-incrimination, quoting the conclusions of the Australian Report as follows:

This has never been recognised as a limitation upon the evidence which a witness before a parliamentary committee could be required to give. No doubt, in given cases, if a witness were to object on this ground, his objections might be upheld because the committee felt it unnecessary to their inquiry to pursue the matter. However, if the matter was one upon which it considered evidence was necessary, the objection would not be upheld. Having in mind the nature and purpose of parliamentary investigation, we think it would be unnecessarily restrictive on the achievement of that purpose to give a witness a statutory right to object on the

-
- (1) Such unpredictability is a common feature of parliamentary committee proceedings.
 - (2) They recommend the form of oath proposed in the Ontario Law Reform Commission's 1976 Report on the Law of Evidence, as follows: "I solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead [the Committee]."
 - (3) Supra, p. 6.

ground of self incrimination. It would undoubtedly be used to confine the investigation and could in some cases prevent the Committee from ascertaining the facts on matters of obvious public interest.(1)

The Law Reform Commission then surveyed the status of public servants and Ministers as witnesses, and the information which they can be compelled to disclose.

As to the status of public servants and Ministers as a question of law only, these witnesses are in the same position as any other witness - in theory they could be compelled by the Legislative Assembly to testify on any issue, answer any question or produce any document. There is no legally guaranteed immunity from Parliament's broad power to call for information, and therefore no special status. As a practical matter, committees are political forums and do not operate on the basis of strict legal rights. Questions to ministers and public servants will be asked and answered in a manner that preserves ministerial responsibility and the impartiality and anonymity of the public service in accordance with the convention and traditions of parliamentary government.

The information that these witnesses can be compelled to disclose relates to the complex doctrine of Crown privilege.(2) The general conclusions of the Law Reform Commission may be stated here. It regarded controversies on the release of such information as a focal point of our governmental system, the point where the need of the Executive to prevent disclosure in order to function clashes with the supremacy of the legislature. It rejected the imposition of any outside decision-maker in

(1) Australian Report, p.80, para 232 (j)(i). Limits on the use of such evidence, hearings in camera and non-publication of evidence are all options available to further protect a witness.

(2) The interaction of legal doctrines and parliamentary tradition, the existence of freedom of information laws (federally the Access to Information Act, S.C.) and guidelines for public servants make the issue of release of government information to legislative committees a most complex matter of law and practice. For a discussion of practice in Great Britain and Australia, see Hugh Finsten, The Power of Parliamentary Committees in Britain and Australia to Send for Government Documents, Research Branch, Library of Parliament, 8 July 1980.

both the matter of the compellability of public servants and release of government information or any legally stated exemption, thereby calling for a continuation of the system where disputes are settled by political compromise with the full legislature as the decision-maker in difficult cases.⁽¹⁾

The OLRC also studied the sanctions that may be imposed for non-attendance or non-cooperation by reviewing the questions: What body should impose sanctions (the Legislative Assembly as at present, or the courts)? What conduct should constitute contempt? What should be the nature of the sanctions? (At present, the only available punishment is imprisonment.)

The OLRC notes that the right of Parliament to punish for contempt is regarded by some as "the keystone of parliamentary privilege," essential to the functioning of Parliament, and by others as an inappropriate mechanism in which parliamentarians are judges in their own cause. This latter group would like to see decisions on contempt and its punishment placed in the courts as is the United States practice.

While acknowledging that the present procedure is cumbersome, and that the matter will have a "political flavour," the OLRC recommends retaining the traditional enforcement jurisdiction of the Assembly. Non-cooperation with a committee is contempt of the Assembly and should be dealt with by that body.

The Assembly is best able to assess the merits of any objections offered by a witness and to weigh the nature and seriousness of the offence relative to the purpose of the proceedings. In determining what course of action ought to be taken, the Assembly will justifiably bear in mind not simply whether, as a matter of law, a contempt has occurred, but whether it is advisable to proceed further in the matter and exercise its penal jurisdiction, having regard to all the circumstances of the case. In so doing, the Assembly is able to tailor its response to the individual case, without undue emphasis on the strictly legal aspects of the conduct involved. We believe that this flexibility is sufficiently important to be preserved.

Of course, we do not mean to suggest that none of the safeguards inherent in judicial proceedings ought to

(1) OLRC Report, p. 44-45.

be applied to contempt proceedings in the Assembly. The Assembly should be scrupulous in ensuring that all persons brought before it are given a fair hearing, including the right to legal representation and to be afforded a reasonable opportunity to defend their actions. However, we are of the view that the rights of persons allegedly in contempt can be safeguarded adequately in and by the Assembly itself, and need not necessarily be exercised only in a court of law.⁽¹⁾

In Ontario, the Legislative Assembly Act lists the categories of conduct that may be punished as contempt. Those affecting committee witnesses are: bribing a member in respect of matters before a committee; tampering with a witness; giving false evidence or refusing to give evidence; disobeying a Speaker's warrant to attend; or knowingly presenting a forged or false document.⁽²⁾ The OLRC recommended the addition of the following offences: escape from custody (after apprehension on a Speaker's warrant); knowingly attempting to dissuade or prevent a person from obeying such a Speaker's warrant for appearing before a committee; and inflicting violence or harm on a witness. Punishment for contempt should be expanded to permit imposition of a fine⁽³⁾ as well as the currently available penalty of imprisonment, and the Assembly should have power to vary, suspend or cancel an order for punishment.

As to the procedure for obtaining a Speaker's warrant, the OLRC recommended confirmation of a practice now in use which permits a Committee to obtain a Speaker's warrant requiring the attendance of a witness by approaching the Speaker directly without first reporting the matter to the Assembly for its order. If the Speaker denies the request, the Committee should have an appeal to the Legislative Assembly.

b. The Rights and Protection of Witnesses

In its discussion of the rights and protection of witnesses, the Law Reform Commission examined the following matters: prehearing procedures, the right to counsel and protection of witnesses and third

(1) Ibid., p. 50-51.

(2) Ibid., p. 51.

(3) This has been recommended to the House of Commons by the Special Committee on Reform of the House of Commons.

parties (including use of in camera proceedings, non-publication of sensitive evidence, and use of a witness' evidence at subsequent civil and criminal proceedings).

1) Pre-Hearing Procedures

As a result of the general lack of knowledge concerning committee proceedings, the OLRC recommended that witnesses be advised generally of their rights and duties, (including possible penalties for non-cooperation) not only when they are called to appear, but while appearing. Rules could be stated in a formal way in the Standing Orders, and also set out in a comprehensive explanatory brochure covering matters such as committee procedures; powers and methods of examining witnesses; use of the oath; duties of witnesses and the possibility of contempt or perjury proceedings; the availability of in camera sessions; and the role of counsel. A further aid to witnesses would be a short document - suitable for reading at the hearing itself - briefly reviewing similar matters for the benefit of witnesses about to appear. This could be supplemented in each case by specific information about the subject matter of the committee inquiry being held at that time.⁽¹⁾

2) Right to Counsel and Role of Counsel

After reviewing the practice with respect to the role of counsel in several jurisdictions, the OLRC made the following observations. In all jurisdictions studied (Ottawa, U.K., Australia, U.S.A.) the decision whether counsel may be retained, and the role of such counsel, is in the discretion of the committee. Even though use of counsel is rarely warranted, in all cases committees do permit witnesses to be accompanied by counsel; in most instances, however, counsel is permitted only to advise the witness. On occasion, increased participation has been allowed where allegations of impropriety or misconduct have been involved. There is the suggestion that statements about the right to counsel may be intimidating to prospective witnesses.

(1) OLRC Report, p. 58-61.

The OLRC recommended that the right to counsel before legislative committees be confirmed by statute, and that such counsel be entitled as of right to offer advice to the witness at all times, even if the witness is giving evidence.⁽¹⁾ It is further recommended that "when a witness' rights are or may be in jeopardy or where a witness' reputation is or may be in issue, counsel should be entitled to examine and make submissions on behalf of his client and to cross-examine other witnesses." Counsel should be given "full rights of active participation." Such full participation by counsel would depend on all the circumstances of the case, not on the classification of the type of proceedings. The role of counsel should be a matter of procedure, detailed in the explanatory brochure, not in legislation, which might unduly reduce flexibility.⁽²⁾

3) The Protection of Witnesses and Third Parties

The OLRC approached this matter with a clear recognition of the problems that arise:

The potential for prejudice to a witness or a third party as a result of self-incriminatory, injudicious or defamatory remarks made by the witness, and the potential for prejudice to the civil or public service, province or nation as a result of the disclosure of sensitive or confidential government documents, is a recurring problem in the context of legislative committee proceedings. This problem is, in one sense, unique to legislative committees, since the unlimited scope of the power of the Assembly to compel answers and the production of documents before committees, and the inapplicability of the rules of evidence used in a court, often result in less formal control over what can and may be asked and said at a committee hearing. This less structured approach to the giving of evidence may be contrasted sharply with the formality applicable in the courts, where strict rules of evidence - for example, involving hearsay - are invoked.

...

The Commission recognizes that its view that witnesses should be required to answer all questions insisted upon

(1) Note that the Standing Procedural Affairs Committee recommended the role of counsel remain a matter in the discretion of the committee.

(2) OLRC Report, p. 68-69.

by legislative committees and the Assembly - a view that is consistent with the present law and with the role generally assigned to such committees in the parliamentary system - necessarily restricts somewhat the possibility of resolving the problem to which reference has been made in this section of the Report. So long as committees, backed by the Assembly, have a virtually unfettered right to seek information, and so long as the formal rules of evidence continue to be inapplicable, there will remain some degree of risk to third parties in respect of statements made by committee witnesses. However, we do believe that the problem surrounding the giving of evidence at a legislative committee hearing can be ameliorated to some extent.(1)

The OLRC considered but rejected making it mandatory for witnesses to submit a written statement of the proposed evidence, on the basis that it might discourage participation. It might also result in a system which adopted cumbersome, unworkable procedures, thereby reducing the flexibility of committees.

The study then discussed the use of in camera proceedings and non-publication of evidence. In these matters, it continued to support a flexible, common sense approach with a minimum of rigid rules. In general, the practice of open hearings should be encouraged and continued. However, two recommendations were made pertaining to situations where it is known or anticipated that the evidence might tend to incriminate the witness, reflect prejudicially on the reputation, character or conduct of the witness or another party, or involve a sensitive, privileged, confidential or classified matter, or where for any other reason the committee is of the view that the public interest would be better served by holding the hearing in camera than by holding it in public. The first recommendation is a general one.

We recommend that, on the application of a witness, a committee should be empowered to transfer proceedings from open to closed session in the type of situation just described. A witness should be permitted to justify his request for an in camera hearing in a closed session since, as the Australian Report correctly noted, "It may be difficult for a witness to make the

(1) Ibid., p. 70-72.

application adequately in an open hearing without revealing the nature of the evidence and, therefore, the prejudice he will suffer".(1)

The second recommendation concerned the situation where a legislative committee is dealing with a matter that is the subject of a pending civil or criminal trial and the committee wishes to call witnesses who are also involved in the judicial proceedings. Publicity about wide-ranging committee evidence may well interfere with the judicial process. However, the Commission rejected the option of suspending the committee proceedings, because it might cause such long delays that any meaningful consideration of the issue by the committee would be foreclosed.(2) Thus, the Commission recommended that:

[W]here the proceedings of a legislative committee concern a matter that is also the subject of a pending civil or criminal trial, the proceeding should be held in camera, unless the Legislative Assembly decides otherwise.

The underlying presumption is, then, that where a matter is sub judice, a public hearing by a legislative committee is likely to prejudice the individuals involved in the civil or criminal trial. Consequently, we believe that in this situation the prima facie rule in favour of public hearings should not prevail. However, in some instances the public interest would not be better served by an in camera committee hearing. The Commission is of the view that here, as in other instances, undue rigidity ought to be avoided. We therefore would permit a public hearing where the Assembly, as the ultimate guardian of the public interest, deems it to be in that interest to hold such a hearing.(3)

An alternative protective mechanism is the non-publication of either all or a portion of a witness' evidence, written or oral. This can be used in case of assertion of Crown privilege, or danger of damage to reputation. It can be used as a follow-up rule to the sub judice problem. Evidence taken in camera regarding a matter that is before the courts should be published only after completion of all possible legal proceedings, including appeals. As a general conclusion on non-publication, the

(1) Ibid., p. 76 (emphasis added).

(2) Ibid., p. 77.

(3) Ibid., p. 78-79.

Commission recommends that "on the application of a committee witness or on its own motion, a committee should be empowered to order that all or part of a witness' evidence should not be published."⁽¹⁾ The witness should not be entitled as of right to demand non-publication even of in camera evidence, which may be crucial to a committee's report. Thus, in the Commission's view, a committee should not be legally bound to keep in camera evidence confidential in all cases. As a matter of fairness, witnesses should be informed that in some cases in camera evidence may be made public. This should only occur where there are very compelling reasons and prima facie it should remain private.⁽²⁾

The Law Reform Commission completed its review of the rights and protection of a witness with a detailed analysis of the law surrounding use of a witness' evidence at subsequent proceedings. Some aspects of the discussion dealt with provincial jurisdiction, while other elements have been superseded by passage of the Charter, in which section 13 deals with use of incriminating evidence against a witness in subsequent criminal proceedings.⁽³⁾ The general conclusions as to application of privilege to a witness' testimony and the proposal for legislation to clarify and expand the protection available are of considerable interest.

The OLRC concludes that at common law even in a provincial legislature,⁽⁴⁾ the evidence of witnesses is inherently privileged, since the right to demand any and all information from witnesses is reasonably necessary for the proper exercise of the legislature's functions and duties. The privilege is that of the legislature, not of the witness, and can be waived "at any time and for any reason"; that is, the legislature can consent to the use of evidence at subsequent civil or other proceedings. Such a waiver would no longer be effective in allowing evidence to be used for the purpose of incriminating a witness in later criminal proceedings, because the courts are bound by section 13 of the Charter. No protection is

(1) Ibid., p. 80.

(2) Ibid., p. 81.

(3) See discussion, p. 8-9 supra.

(4) Where the scope of common law privilege is more restricted than in Parliament, see Kielley v. Carson (1841) 4 Moo. P.C. 63, and discussion in OLRC Report, p. 84-93.

afforded to witnesses by either the Ontario⁽¹⁾ or Canada Evidence Act⁽²⁾ sections barring use of incriminating evidence in civil or criminal proceedings, since application of these sections is dependent upon a pre-existing common law right (taken away by statute) to refuse to give incriminating evidence. Committee witnesses have never enjoyed a common law right to refuse to answer.

The Law Reform Commission recommended passage of legislation at both the federal and provincial levels to clarify and perhaps expand the protection of witnesses, particularly in view of the uncertainty of the common law regarding privilege, an area where the courts and Parliaments may well differ. It was concluded that the province has power to enact broad legislation designed to protect witnesses in respect of the use of their evidence at subsequent proceedings and the passage of similar federal legislation was urged as well.⁽³⁾

The Commission recommends the enactment by the Province of Ontario of broad statutory provisions protecting witnesses in respect of the use of their evidence at subsequent proceedings. More specifically, we recommend that a witness who gives evidence at any legislative committee proceedings - whether such evidence is given orally, by way of affidavit, by the provision of documents, or otherwise - should have the right not to have any evidence so given used against that witness in any subsequent proceeding, except in a prosecution for perjury or for the giving of contradictory evidence.⁽⁴⁾

This protection should extend to all witnesses (those who appear voluntarily, as well as those requested or compelled to appear, sworn or not sworn), whether or not they request protection. That is, protection should be absolute and automatic, and it should not be within the power of the legislature to withdraw the protection - despite the danger of witnesses using the forum of committees to make defamatory or malicious remarks, or

(1) R.S.O. 1980, c. 145, s. 9(2).

(2) R.S.C. 1970, c. E-10, s. 5(2).

(3) Since this would be needed to cover criminal procedure, it is less important from the provincial viewpoint with the Charter in effect, but may be needed to clarify parliamentary privilege regarding federal parliamentary committees.

(4) OLRC, Report, p. 112.

purposely revealing incriminating evidence to prevent its use in subsequent proceedings. These dangers are counterbalanced by the element of bad faith and perceived vulnerability of a witness if committees retained power to withdraw immunity.

The OLRC recommends that the protection extend only to direct use of the evidence - such evidence could be used as a lead to obtain other, admissible evidence regarding the same matter. This contrasts with the "transaction immunity" given in New Zealand and the United States which amounts to a stay of proceedings against the witness in respect of any act or thing previously done and revealed by his evidence. Such immunity would greatly increase the danger (noted above) of an individual's using committee proceedings to escape later liability. They cite and agree with the Australian Report to the effect that evidence given in camera and not subsequently published would not be available to law enforcement officials for any use.

3. Report of the Procedural Affairs Committee
on the Standing Orders and Procedure (No. 1)

The Ontario Procedural Affairs Committee considered the Law Reform Commission's recommendations and presented a report to the legislature on 9 December 1982. While it agreed with many aspects of the Law Reform Commission's Report, it did recommend that the practices and conventions concerning witnesses appearing before committees should be set out clearly in a manual of practices rather than being codified in the Legislative Assembly Act or the Standing Orders.

The recommendations of the Committee were divided into two parts: those which require amendments to the Legislative Assembly Act and those which can simply be adopted as practices of the Assembly.

a. Recommendations Requiring Amendments to the
Legislative Assembly Act

If a person is called to appear before a committee and refuses to attend or, alternatively, does not bring papers which are required, the Legislative Assembly Act can be invoked and the Speaker issue a

warrant ordering the attendance of the witness.⁽¹⁾ However, this section requires the Assembly to make an order before the Speaker may issue the warrant. In some instances, a committee has been given the power to approach the Speaker directly when hearings are being held during a period when the Assembly is not in session.

It was recommended by the Committee that the Legislative Assembly Act be amended to provide that a legislative committee be entitled to approach the Speaker directly for a warrant compelling the attendance of such witnesses or the production of such papers and items as the committee considers necessary for the proceedings and deliberations. This approach could be made after the committee in question had exhausted all informal avenues and had issued a summons itself which had been disobeyed.

The Procedural Affairs Committee agreed with the recommendation of the Law Reform Commission that evidence given by a person before the Assembly or one of its committees should not be used or received in evidence against the person in any civil proceeding. It recommended that a clause expressing this position be included in the Legislative Assembly Act.

The Commission recommended that the Assembly retain jurisdiction to punish for contempt or breaches of privilege and continue to have authority to impose legal sanctions. The Procedural Affairs Committee concurred with this recommendation and also with the suggestion that the list of matters to which this sanction could apply should be broadened.

With regard to the use of the oath, both the Commission and the Procedure Committee agreed that "where the rights or reputation of an individual or the propriety of an individual's conduct are or may be involved, as a matter of practice committees should employ the oath."⁽²⁾ It was also recommended that a new oath be substituted for the one presently in the Legislative Assembly Act. It would read as follows: "The evidence you shall give to this Committee shall be the truth, the whole truth, and nothing but the truth, well knowing that it is a serious offence to give false evidence with intent to mislead the Committee. So help you God." A form of affirmation was also to be included in the Act which also was to contain the "well knowing" phrase.

(1) Legislative Assembly Act, R.S.O. 1980, s. 35(2).

(2) OLRC Report, p. 20.

b. Recommendations Which Could Be Included in the
Standing Orders or As Practices of the Assembly.

The Committee determined that many matters could be included in a manual of practices which would be published as an annex to the Standing Orders. Some of these matters include a statement that all witnesses are to have the same rights no matter who they are or the circumstances under which they appear. A witness should be entitled to counsel at a meeting but the committee has complete discretion in determining the role for such counsel. Cross-examination of witnesses by counsel is not a right but should be offered when the Committee feels that a witness has had his or her rights or reputation placed in jeopardy or the witness' conduct has been called into question.

Much the same reasoning applies to the use of an oath or affirmation. It is not to be looked upon as mandatory and its use should be in the discretion of the committee.

With regard to the subject of in camera meetings, the Committee determined that the recommendations of the Commission were too restrictive and that this is a question to be left to the discretion of the individual committee. For guidance the Procedural Affairs Committee suggested that in camera meetings would be held when the matter under consideration was the subject of a pending criminal or civil trial. Also if the matter was particularly sensitive or might reflect prejudicially on the reputation of the witness or another party, the hearing could be held in camera.

Unfortunately the Report of the Committee was not debated and remained on the Order Paper until the session was prorogued.

B. Quebec

The lack of protection available to witnesses appearing before committees of the Quebec National Assembly was brought into focus as a result of a committee investigation of Premier Lévesque's alleged involvement with the out-of-court settlement of the damage suit arising from riots at the James Bay worksites. Concerns were raised regarding the partisan

nature of the hearings, the type of questioning, and the powers of the committees to call witnesses. A task force of lawyers from the National Assembly and the Ministry of Justice was given a mandate to recommend ways of ensuring better protection for witnesses appearing before legislative committees.

The Report of this study group released in August 1984 addressed two significant questions: who should receive protection as a witness, and secondly, in respect of what type of committee is protection required? That is, should witnesses' rights be defined and strengthened only when parliamentary committees undertake investigations, or is protection required in all cases?

In answer to the first question, the study group adopted the conclusion of the Ontario studies, that any citizen, any person who gives evidence before a committee of the Assembly, no matter what circumstances have brought the witness before the committee, should be considered a witness whose rights should be protected.

After considering the possibility of according the same protection to all witnesses, no matter what the committee's terms of reference might be, the working group came to the conclusion that different levels of protection are required. They proposed a set of basic rights for all witnesses, and a second set of supplementary rules for the protection of witnesses appearing before committees inquiring into the conduct of a Member (art. 311, Rules of Procedure), or of another person (art. 317, Rules of Procedure under Title VI of the Rules of Procedure) and in certain other cases.

The basic protections to be provided to witnesses are as follows. Witnesses should have the right to receive notice of the hearing several days in advance. This notice should state not only details of the date, time, place of the meeting, and the terms of reference of the committee, but also the subject or subjects upon which the committee wishes to question the witness. A list of documents to be provided by the witness should also be forwarded to the witness. This notice should be accompanied by a document explaining the rules and powers of the committee, the rights and duties of witnesses, and possible sanctions in the event of non-compliance.

During the hearing a witness should have the right to be represented by counsel of his or her choice and by other advisors if desired. A witness should be permitted to present and justify in camera a request to be heard in camera, provided that the request is based on one or more of the following five grounds. These are: a) the secrecy of the deliberations of a board of directors; b) respect for trade secrets; c) respect for privacy; d) protection of dignity, honour or reputation; or e) avoidance of public disclosure of evidence not in the public interest. It would be up to the committee to decide whether or not evidence would be heard in camera.

Rules should also be devised with respect to the form of questioning of witnesses, based on the rules for question period in the Assembly. Questions should be short, should not be an expression of opinion or argument, nor be founded on conjecture; they should not suggest the answer or be formulated in a manner liable to lead to debate. Repetitive questions or those calling for a response based on hearsay (knowledge of facts not within the personal knowledge of the witness) should also be forbidden. The study group considered that respect for even minimum standards of proof would require that witnesses or their counsel, as well as committee members, should have the right to object to irregular questions. These would be questions not in accordance with the rules described above or those in conflict with the Quebec Charter of Rights. Such objections should be decided by the Chairman of the Committee, with the right to appeal to the Speaker of the National Assembly.

The report suggests further that any person whose name is mentioned during public deliberations of a Committee should be entitled to make a written request to the Chairman giving reasons why he or she should be heard by the Committee.

Supplementary protection should be offered to witnesses appearing before inquiries established by the National Assembly. This added protection should be compulsory in inquiries scrutinizing the conduct of individuals, and should apply unless the committee rules in advance that they will not apply. This would be in the case of a "mandat d'initiative" or any other committee study other than the study of bills. It was recommended that, providing a copy of the opening statement has been supplied to the

21er 48 hours in advance, the right to make a 10-minute opening statement will be granted to each witness. Questioning should be carried out by only one member of each party (and by independent members of the committee), starting with government questions, then opposition, then independent. The second round of questioning would be limited to the first questioner following up answers given to other committee members. After all testimony had been heard, each member would have 20 minutes to sum up his or her observations and conclusions, and make recommendations. Although such rules would clearly place constraints on members, they would provide greater protection for witnesses and a better legal framework for questioning, a framework which would go a long way towards eliminating the abuse of witnesses' rights.

The study group dealt with two other matters of interest. It proposed that a mechanism be devised whereby opposition members would be permitted to call certain witnesses despite a majority decision against calling those persons. The second matter was that broadcasting or photos of proceedings be permitted only with a majority vote of the full committee, on the condition that no witness who objects be required to testify while proceedings are being broadcast.

CONCLUSION

The most recent proposals for reform of the Canadian House of Commons concentrate particularly on the enhancement of the committee system.⁽¹⁾ Only through a stronger committee system can the private member play a meaningful role in the policy influencing process. Other than warning that it is essential that witnesses, especially witnesses from the public service, cooperate with committees, little attention is paid to the plight of the committee witness in that Report.

This paper has dealt with the recent thinking on the subject of committee witnesses in Ontario and Quebec. Some of the matters touched upon in this review could be of benefit if implemented by the committees of our federal Parliament.

(1) Special Committee on Reform of the House of Commons, Third Report, June 1985, p.15.

For example, the Ontario reports stress that, except in the case of matters to which the doctrine of Crown privilege may attach, all witnesses should be treated similarly and there should be no stigma attached to witnesses who must be compelled to appear. If there is a dispute as to the compellability of a public servant or the release of government information, this should be settled in the political arena. One practice which was mentioned by the Ontario Law Reform Commission and supported by the Report of the Procedural Affairs Committee was that a committee should be permitted to approach the Speaker directly to obtain a warrant requiring the attendance of a witness without first reporting the matter to the Assembly for its order.

The use of the oath or affirmation should be limited to the case where the rights or reputation of an individual may be in question.

Presently the right to counsel and the participation of such counsel in a hearing is at the discretion of the committee. The Ontario Law Reform Commission recommends that this right be acknowledged and confirmed by statute. While the active participation by counsel would still be at the discretion of the committee, at least the witness would be assured that counsel would be in attendance.

Both the Ontario study and the Quebec study group recommended that in camera proceedings be used to facilitate the taking of evidence when it might touch on the character of the witnesses or another party or if the matter before the committee is simultaneously before the courts.

The proposal by the Quebec study group that different types of committees should have different levels of protection for witnesses is interesting, as is the view that prior to the hearing more information should be supplied to the witness about the nature of the committee process and what is expected of the witness.

It was suggested by the Quebec study that the questioning of witnesses take place in a more orderly fashion than at present. This would result in greater coherence and more protection for the witness.

All of these matters are worthy of study by the Canadian Parliament. However, it would be extremely helpful if there were more communication between the potential witness and the committee prior to the witness' appearance. The witness should be aware of the scope of the

committee's mandate and the role he or she is to play in the committee's work. A guide for committee witnesses should be available so that they would have the opportunity to acquaint themselves with committee procedure and their rights and obligations prior to their appearance.

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A P P E N D I X I

THE CONSTITUTION ACT, 1867

Privileges, etc.,
of Houses.

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof. (7)

STANDING ORDERS - HOUSE OF COMMONS

- 65.(8) Powers of standing committees. (8) Standing committees shall be severally empowered to examine and enquire into all such matters as may be referred to them by the House, and, to report from time to time, and, except when the House otherwise orders, to send for persons, papers and records, to sit while the House is sitting, to sit during periods when the House stands adjourned, to print from day to day such papers and evidence as may be ordered by them, and to delegate to sub-committees all or any of their powers except the power to report direct to the House.
- 65.(9) Only members may vote or move motion. (9) Any Member of the House who is not a member of a standing or special committee, may, unless the House or the committee concerned otherwise orders, take part in the public proceedings of the committee, but may not vote or move any motion, nor be part of any quorum.

[S.O. 69. (9)]



CHAPTER S-8

An Act respecting the Senate and House of Commons

SHORT TITLE

Short title

1. This Act may be cited as the *Senate and House of Commons Act*. R.S., c. 249, s. 1.

DEMISE OF THE CROWN

Not to dissolve
Parliament

2. No parliament of Canada shall determine or be dissolved by the demise of the Crown, but such parliament shall continue, and may meet, convene and sit, proceed and act, notwithstanding the demise of the Crown, in the same manner as if such demise had not happened. R.S., c. 249, s. 2.

Prerogative
saved

3. Nothing in section 2 alters or abridges the power of the Crown to prorogue or dissolve the Parliament of Canada. R.S., c. 249, s. 3.

PRIVILEGES AND IMMUNITIES OF MEMBERS AND OFFICERS

Privileges, etc.,
of Senate and
House of
Commons

4. The Senate and the House of Commons respectively, and the members thereof respectively, hold, enjoy and exercise,

(a) such and the like privileges, immunities and powers as, at the time of the passing of the *British North America Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to that Act; and

(b) such privileges, immunities and powers as are from time to time defined by Act of

CHAPITRE S-8

Loi concernant le Sénat et la Chambre des communes

TITRE ABRÉGÉ

1. La présente loi peut être citée sous le titre: *Loi sur le Sénat et la Chambre des communes*. S.R., c. 249, art. 1.

TRANSMISSION DE LA COURONNE

2. Le Parlement du Canada ne cesse pas d'exister ni n'est dissous du fait de la transmission de la Couronne; mais ce Parlement subsiste et peut se réunir, s'assembler et siéger, délibérer et agir, nonobstant la transmission de la Couronne, comme si cette transmission n'eût pas eu lieu. S.R., c. 249, art. 2.

Le Parlement
n'est pas dissous

3. Rien à l'article 2 ne modifie ni ne restreint le pouvoir que possède la Couronne de proroger ou de dissoudre le Parlement du Canada. S.R., c. 249, art. 3.

Prerogative
conservée

PRIVILÈGES ET IMMUNITÉS DES MEMBRES ET FONCTIONNAIRES

4. Le Sénat et la Chambre des communes, respectivement, ainsi que leurs membres respectifs, possèdent et exercent

Privileges, etc.,
du Sénat et de
la Chambre des
communes

a) les mêmes privilèges, immunités et attributions que possédaient et exerçaient, lorsque a été voté l'*Acte de l'Amérique du Nord britannique, 1867*, la Chambre des communes du Parlement du Royaume-Uni, ainsi que ses membres, dans la mesure où ils ne sont pas incompatibles avec ladite loi; et

b) les privilèges, immunités et attributions qui sont de temps à autre définis par une

the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively. R.S., c. 249, s. 4.

Privileges to be judicially noted

5. Such privileges, immunities and powers are part of the general and public law of Canada, and it is not necessary to plead the same, but the same shall, in all courts in Canada, and by and before all judges, be taken notice of judicially. R.S., c. 249, s. 5.

Printed copy of journals

6. Upon any inquiry concerning the privileges, immunities and powers of the Senate and of the House of Commons or of any member thereof respectively, any copy of the journals of the Senate or House of Commons, printed or purported to be printed by the order of the Senate or House of Commons, shall be admitted as evidence of such journals by all courts, justices and others, without any proof being given that such copies were so printed. R.S., c. 249, s. 6.

loi du Parlement du Canada, n'excédant pas ceux que possédaient et exerçaient, respectivement, à la date de cette loi, la Chambre des communes du Parlement du Royaume-Uni et ses membres. S.R., c. 249, art. 4.

Connaissance judiciaire de ces privilèges

5. Ces privilèges, immunités et attributions font partie de la loi générale et publique du Canada, et il n'est pas nécessaire de les alléguer spécialement, mais tous les tribunaux et tous les juges du Canada doivent en prendre judiciairement connaissance. S.R., c. 249, art. 5.

Un exemplaire imprimé des journaux en fait foi

6. Lors de toute enquête tenue au sujet des privilèges, immunités et attributions du Sénat et de la Chambre des communes, ou de l'un de leurs membres respectivement, tout exemplaire des journaux du Sénat ou de la Chambre des communes, imprimé, ou paraissant l'être, par ordre du Sénat ou de la Chambre des communes, est recevable comme preuve de ces journaux devant tous les tribunaux, juges de paix et autres, sans qu'il soit besoin de prouver que cet exemplaire a été ainsi imprimé. S.R., c. 249, art. 6.

REPORT AND PROCEEDINGS

Proceedings based on report, etc. published under authority

7. (1) Any person who is a defendant in any civil or criminal proceedings commenced and prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of the Senate or House of Commons, may bring before the court in which such proceedings are so commenced and prosecuted, or before any judge of the same, first giving twenty-four hours notice of his intention so to do to the prosecutor or plaintiff in such proceedings, or to his attorney or solicitor, a certificate under the hand of the Speaker or Clerk of the Senate or House of Commons, as the case may be, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such civil or criminal proceedings have been commenced and prosecuted, was or were published by such person or by his servant, by order or under the authority of the Senate or House of Commons, as the case may be, together with an affidavit verifying such certificate.

Stay of proceedings

(2) Such court or judge shall thereupon

RAPPORT ET PROCÉDURES

Procédures fondées sur un rapport, etc. publiées avec autorité de la Chambre

7. (1) Tout défendeur dans des procédures civiles ou criminelles intentées et poursuivies de quelque façon que ce soit, en raison ou en conséquence ou au sujet de la publication, par ce défendeur ou son préposé, d'un rapport, document ou procès-verbal, avec ou sous l'autorisation du Sénat ou de la Chambre des communes, peut produire devant la cour où ces procédures ont été ainsi intentées et poursuivies, ou devant un juge de cette cour, après avoir, au préalable, donné vingt-quatre heures d'avis de son intention de ce faire au demandeur ou poursuivant en cause, ou à son procureur ou avocat, un certificat, revêtu du seing du président ou du greffier du Sénat ou de l'Orateur ou du greffier de la Chambre des communes, selon le cas, portant que le rapport, document ou procès-verbal, selon le cas, à l'égard duquel les procédures civiles ou criminelles ont été intentées et poursuivies, a été publié par le défendeur ou son préposé, d'ordre et avec l'autorisation du Sénat ou de la Chambre des communes, selon le cas, ainsi qu'un affidavit attestant ce certificat.

Arrêt des procédures

(2) La cour ou le juge doit alors arrêter

of the Senate or the accountant of the House of Commons, shall pay to the member the allowance to which he is entitled. R.S., c. 249, s. 45.

Sums granted to Her Majesty

45. There is hereby granted to Her Majesty, out of any unappropriated moneys forming part of the Consolidated Revenue Fund, an annual sum sufficient to enable Her Majesty to pay the amount of the sessional allowances hereinbefore mentioned. R.S., c. 249, s. 46.

How expended

46. All moneys expended under this Act, in respect of the House of Commons, shall be expended and accounted for in the same manner as moneys for defraying the contingent expenses of the House of Commons are to be expended and accounted for under the *House of Commons Act*. R.S., c. 249, s. 47.

Idem

47. (1) Credits for all sums voted by Parliament and payable in respect of allowances to members of the Senate as hereinbefore provided, and in respect of other expenditure for the service of the Senate, shall issue from time to time.

Credits on banks of Canada

(2) Such credits shall issue on one of the banks of Canada in favour of the Clerk of the Senate and the assistant accountant of the Senate, or such other persons as the Speaker of the Senate from time to time designates for the purpose.

Clerk to apply

(3) Such Clerk shall, from time to time, apply for such credits as he deems necessary by an order signed by him. R.S., c. 249, s. 48.

affidavits, le greffier du Sénat ou le comptable de la Chambre des communes verse au sénateur ou député l'indemnité et l'allocation auxquelles il a droit. S.R., c. 249, art. 45.

45. Il est par les présentes accordé à Sa Majesté, sur les deniers non attribués qui font partie du Fonds du revenu consolidé, une somme annuelle suffisante pour permettre à Sa Majesté de payer le montant des indemnités de session ci-dessus mentionnées. S.R., c. 249, art. 46.

Sommes votées à Sa Majesté

46. Les deniers dépensés sous l'autorité de la présente loi à l'égard de la Chambre des communes doivent l'être de la même manière que le sont les sommes destinées à acquitter les dépenses imprévues de ladite Chambre sous le régime de la *Loi sur la Chambre des communes*, et il doit en être rendu compte de la manière dont il est rendu compte de ces sommes aux termes de ladite loi. S.R., c. 249, art. 47.

Comment sont dépensés les deniers prévus par la présente loi

47. (1) Des crédits pour toutes les sommes votées par le Parlement et payables sous forme d'indemnités aux membres du Sénat, ainsi qu'il est ci-dessus prescrit, et au sujet des autres dépenses pour le service du Sénat sont ouverts à l'occasion.

Idem

(2) Ces crédits sont ouverts sur une des banques du Canada en faveur du greffier du Sénat et du comptable adjoint du Sénat, ou de telles autres personnes que le président du Sénat désigne de temps à autre à cette fin.

Crédits ouverts sur une banque canadienne

(3) Par ordre sous son seing, ce greffier demande, à l'occasion, l'ouverture des crédits qu'il juge nécessaires. S.R., c. 249, art. 48.

Demande en est faite par le greffier

SCHEDULE

FORM A

The evidence you shall give on this examination shall be the truth, the whole truth and nothing but the truth. So help you God.

FORM B

I, A.B., do solemnly, sincerely and truly affirm and declare the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely and truly affirm and declare, etc.
R.S., c. 249, Sch.

ANNEXE

FORMULE A

Le témoignage que vous rendrez dans cette enquête sera la vérité, toute la vérité et rien que la vérité. Ainsi Dieu vous soit en aide.

FORMULE B

Jc, A.B., affirme et déclare solennellement, sincèrement et véridiquement que, d'après mes croyances religieuses, la prestation d'un serment est illégale, et j'affirme et déclare solennellement, sincèrement et véridiquement aussi que, etc.
S.R., c. 249, annexe.



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